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PATENT APPLICATION
09/692,884

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Kenneth R. Owens, et al.
Serial No.: 09/692,884
Filing Date: October 20, 2000
Confirmation No.: 6113
Group Art Unit: 2616
Examiner: Jason E. Mattis
Title: METHOD FOR ESTABLISHING AN MPLS DATA
 NETWORK PROTECTION PATHWAY

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

REQUEST FOR PRE-APPEAL BRIEF REVIEW

In response to the Advisory Action mailed November 16, 2006, Applicant respectfully requests a Pre-Appeal Brief review of this Application so that the rejection of the claims and the objections to the Application can be reconsidered prior to submission of an Appeal Brief.

REMARKS

This Request for Pre-Appeal Brief Review is being filed in accordance with the provisions set forth in the Official Gazette Notices of July 12, 2005 and January 10, 2006. Pursuant to the Official Gazette Notices, this Request for Pre-Appeal Brief Review is being filed concurrently with a Notice of Appeal. Applicant respectfully requests reconsideration of the Application in light of the remarks set forth below.

Claims 10, 11, and 13-24 currently stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al in view of McAllister, et al. Claims 1, 2, 4, 5, and 7-9 currently stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al in view of McAllister, et al. and further in view of Hwang, et al. Claims 3 currently stands rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al in view of McAllister, et al. and Hwang, et al. and further in view of Aukia, et al. Claim 12 currently stands rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al in view of McAllister, et al. and further in view of Aukia, et al. Claim 6 currently stands rejected under 35 U.S.C. §103(a) as being unpatentable over Cao, et al in view of McAllister, et al. and further in view of Lemieux. In the prosecution of the present Application, the Examiner's rejections and assertions contain clear errors of law, including a failure to establish a prima facie case of obviousness. To assist the Panel in the review of this Request for Pre-Appeal Brief Review, Applicant submits the following brief summary for consideration.

In the Advisory Action of November 16, 2006 and the Final Action of August 22, 2006, the Examiner indicates that the claims are obvious from the McAllister, et al. patent in that the layer 3 P-NNI signaling messages and acknowledgments are

part of the traffic flow and are sent in response to traffic flow being received. However, the P-NNI signaling messages of the McAllister, et al. patent relied on y the Examiner in rejecting the claims are part of a signaling link 38 separate and apart from the data link 36. The P-NNI signaling messages establish a polling process for the signaling link 38. The P-NNI signaling messages are independent of whether traffic was received on the data link 36. Thus, the McAllister, et al. patent fails to provide any traffic indication message indicating whether traffic was received on its data link let alone received intact and on time as required in the claimed invention. Moreover, since there is no disclosure for the sending of this traffic indication message, the McAllister, et al. patent cannot control protection switching in response to an interruption of this traffic indication message. Thus, the Examiner's reliance on the McAllister, et al. application contradicts the features of the claimed invention.

Most notable of the legal errors present in the examination of the Application is a failure of the Final Action of August 22, 2006 to establish a prima facie case of obviousness of the claims in the Application rejected under 35 U.S.C. §103(a). There has been no mention of the three criteria for a prima facie case of obviousness as spelled out in M.P.E.P. §2143. The Examiner has not cited any language from the prior art that would suggest that the Cao, et al., McAllister, et al., Hwang, et al., Aukia, et al., or Lemieux patents can be modified or combined with each other as proposed. The Examiner only provides a baseless subjective and conclusory "it would have been obvious" statement for modifying and combining the Cao, et al., McAllister, et al., Hwang, et al., Aukia, et al., and Lemieux patents without providing any objective reasoning or citing any evidence of record to support such positions. In fact, the functionality

of these cited patents are incompatible with one another. The Examiner has not cited any justification from these cited patents that their incompatible functionalities could even remotely be combined as has been proposed. In addition, the Examiner has not provided any reasons how the structure resulting from combining the Cao, et al. McAllister, et al., Hwang, et al., Aukia, et al., and Lemieux patents would have any expectation of success let alone a reasonable expectation of success. Moreover, the Examiner has failed to show that the proposed combination would even work for its intended purpose according to the claimed invention.

As for teaching the claimed invention, the Examiner has not been able to show that the Cao, et al. and McAllister, et al. patents provide any capability at any of its nodes to determine whether traffic on a data path was received let alone an ability to provide such an indication along a reverse notification path as provided in the claimed invention. Moreover, the Cao, et al. and McAllister, et al. patents fail to use the interruption of this traffic indication message to control protection switching at the sending switch. In addition, the Cao, et al., McAllister, et al., and Hwang, et al. patents fail to disclose any capability to indicate that the traffic was received intact and on time.

Based on the remarks above, the Cao, et al., McAllister, et al., Hwang, et al., Aukia, et al. and Lemieux patents are insufficient to support a rejection of the claims. Therefore, Applicant respectfully submits that the claims are patentably distinct from the Cao, et al., McAllister, et al., Hwang, et al., Aukia, et al. or Lemieux patents, either alone or in combination.

CONCLUSION

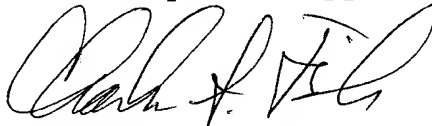
Applicant has now made an earnest attempt to place this Application in condition for allowance. For the foregoing reasons and for other apparent reasons, Applicant respectfully requests allowance of all pending claims.

The Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. 02-0384 of BAKER BOTTS L.L.P.

Respectfully submitted,

BAKER BOTTS L.L.P.

Attorneys for Applicant

A handwritten signature in dark ink, appearing to read 'Charles S. Fish', is written over the printed name.

Charles S. Fish

Reg. No. 35,870

December 21, 2006

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